

Decision 05-10-048

October 27, 2005

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to  
Examine the Commission's Future  
Energy Efficiency Policies,  
Administration and Programs.

Rulemaking 01-08-028  
(Filed on August 23, 2003)

**ORDER DENYING REHEARING**  
**OF DECISION (D.) 05-07-009**

**I. SUMMARY**

In Decision (D.) 05-07-009, we denied the request of Latino Issues Forum (“LIF”) for intervenor compensation for contributions to D. 05-01-055 involving the administrative structure for post-2004 energy efficiency programs. The denial was based on separate Administrative Law Judge (“ALJ”) rulings on LIF’s two Notice of Intent (“NOI”) filings.

LIF filed its first NOI for contributions to this proceeding on December 5, 2003. ALJ Kim Malcolm issued a ruling on January 24, 2004, and determined LIF filed the pleading “inexplicably late,” more than two years after the initial prehearing conference on September 10, 2001. (ALJ’s Ruling Regarding Notice Of Intent To Claim Compensation, p. 1.) Pursuant to Public Utilities Code Section 1804(a)(1), an intervenor must file a sufficient NOI to claim compensation within 30 days of the prehearing conference (or in special circumstances, at other appropriate times that the Commission specifies). (Pub. Util. Code, §1804, subd. (a)(1).) ALJ Malcolm denied compensation for LIF’s contribution to the proceeding prior to December 2003, but did not prejudge whether LIF is eligible for compensation of future work should the scope of the proceeding change as a result of a second prehearing conference held on January 23, 2004. (ALJ’s Ruling Regarding Notice of Intent to Claim Compensation, p. 1.)

LIF filed another NOI on February 4, 2004 for contributions to the second half of the proceeding, and this time filed timely. In a ruling on February 18, 2004, ALJ Meg Gottstein considered the effect of LIF's first NOI. Because LIF did not timely submit its first NOI, it was subsequently prohibited from seeking contribution for all future work on those issues addressed in the first half of the proceeding. Accordingly, LIF was eligible for compensation if it contributed to the following new issues: (1) energy efficiency incentives, (2) utility-specific energy savings goals, and (3) revising and updating avoided costs. (ALJ's Ruling Regarding Notice of Intent to Claim Compensation, filed February 18, 2004, p. 4.)

On March 4, 2005, LIF timely filed its request for intervenor compensation. We issued D.05-07-009, denying LIF compensation for failure to substantially contribute to the proceeding on any "new issues" as limited by ALJ Gottstein's ruling.

In its rehearing application, LIF alleges that the Commission acted arbitrarily and capriciously by: (1) limiting LIF's contributions in R.01-08-028 to a few "new issues"; and (2) denying LIF compensation because LIF did not timely file Notices of Intent, while the Commission does not require such timeliness as a condition for granting compensation in all cases. LIF further argues that the Commission abused its discretion by denying LIF compensation for its substantial contribution based on a technicality.

We reviewed each and every allegation in Latino Issues Forum's application for rehearing, and are not persuaded that granting a rehearing of D.05-07-009 is warranted. Accordingly, the request for rehearing is denied.

## **II. DISCUSSION**

### **A. Timeliness of Latino Issues Forum's First NOI**

LIF first argues the timeliness of the NOI is not a statutory requirement for compensation, and the Commission abused its discretion based on a technicality. LIF's argument ignores clear statutory and case law.

Numerous decisions have held the statutory deadline is more than mere formality. (*Opinion Denying Compensation* [D.04-05-004] (2004) \_\_\_ Cal.P.U.C.3d \_\_\_, 2004 Cal. PUC LEXIS 226; *Opinion Denying Compensation* [D.00-03-044] (2000) \_\_\_ Cal.P.U.C.2d \_\_\_, 2000 Cal. PUC LEXIS 168; see also, *Opinion Revising The Intervenor Compensation Program* [D.98-04-059] (1998) 79 Cal.P.U.C.2d 628, \_\_\_, 1998 Cal. PUC LEXIS 429, p. \*47.) Moreover, the deadline is proscribed by statute. Public Utilities Code Section 1804(a)(1) provides: “A customer who intends to seek an award under this article *shall*, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation.” (Pub. Util. Code, §1804, subd. (a)(1), emphasis added.) In D.04-05-044, Greenlining Institute (“Greenlining”) filed its NOI two months after the statutory deadline, and was subsequently denied intervenor compensation. Greenlining asserted that a denial based on timeliness of the NOI was a mere technicality. We rejected the argument, clearly stating “the NOI is a *statutory* requirement. (*Opinion Denying Compensation* [D.04-05-044], *supra*, 2004 Cal. PUC LEXIS 226, at p. \*8; *Opinion Denying Compensation* [D.00-03-044], *supra*, 2000 Cal. PUC LEXIS 168, at p. \*6; see also *Opinion Revising The Intervenor Compensation Program* [D.98-04-059], *supra*, 1998 Cal. PUC LEXIS 429, at p. \*47.) In D.00-03-044, the Commission denied compensation to The Utility Reform Network (“TURN”) for the same reason. That decision also established a threshold of when filing a NOI late is inexcusable: “[I]n the prior cited cases, the NOI was only a few days late, or, in the case of a new intervenor, 55 days late. Those cases cannot be likened to this one, in which TURN filed its NOI nine months after it was due.” (*Opinion Denying Compensation* [D.00-03-044], *supra*, 2000 Cal. PUC LEXIS 168, at p. \*6.) If we cannot justify a late NOI filing of nine months, LIF’s late NOI filing of *more than two years* certainly cannot stand.

LIF offers no case law or arguments questioning the authority of the statute. Rather, LIF relies on listing the occasions where the Commission has granted intervenor

compensation regardless of a late-filed NOI.<sup>1</sup> While we have occasionally found exceptions to the statute, both D.00-03-044 and D.04-05-044 indicated that the Commission would be reluctant to do so in the future.<sup>2</sup> (*Opinion Denying Compensation* [D.00-03-044], *supra*, 2000 Cal. PUC LEXIS 168, at p. \*6; *Opinion Denying Compensation* [D.04-05-044], *supra*, 2004 Cal. PUC LEXIS 226, at p. \*8.)

Nevertheless, the decisions cited by LIF in its application for rehearing all show instances of pardonable behavior. For example, in D.02-04-007, TURN filed a late NOI on September 12, 2001, along with a motion seeking approval to late file by one day. Because of the events of September 11, the motion was granted. (*Opinion Granting Compensation* [D.02-04-007] (2002) \_\_\_ Cal.P.U.C.3d \_\_\_, p. 2; 2000 Cal. PUC LEXIS 1112.) In another case cited by LIF, TURN was granted intervenor compensation after submitting a late-filed NOI. (*Opinion on Request for Intervenor Compensation* [D.04-02-014] (2004) \_\_\_ Cal.P.U.C.3d \_\_\_, p. 3; 2004 Cal. PUC LEXIS 4.) In this case, there was no prehearing conference after TURN's intervention, and they delayed the filing of an NOI because it was not immediately clear whether the case would be dismissed. Under the unusual circumstances of that proceeding, we deemed the NOI filing timely. In D.04-05-050, the Commission granted intervenor compensation to TURN despite filing the NOI 58-days late. We found that no harm or prejudice occurred as a consequence of TURN's late-filing. (*Opinion Granting Intervenor Compensation to The Utility Reform Network* [D.04-05-050] (2004) \_\_\_ Cal.P.U.C.3d \_\_\_; 2004 Cal. PUC LEXIS 272.)

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<sup>1</sup> LIF cites several decisions which awarded compensation despite late-filed NOIs, including D.04-08-041, D.04-05-050, D.04-02-014, D.04-01-046, D.03-05-065, D.02-04-007, D.01-08-010, and D.00-04-059. (Rehearing Application, p. 3.)

<sup>2</sup> D.00-03-044 stated: "We later made clear that applicants failing to meet the NOI requirement subsequent to April 23, 1998, when D.98-04-059 was effective, would face an uphill battle in establishing eligibility for compensation." (*Opinion Denying Compensation* [D.00-03-044], *supra*, 2000 Cal. PUC LEXIS 168, at p. \*5.)

LIF's case differs from those decisions that it cites. ALJ Malcolm emphasized the fact that filing the NOI more than two years after the prehearing conference was "inexplicably late." An inexcusable late filing is inconsistent with the legislative intent of the intervenor compensation program, which instructs the Commission to administer the program in a manner that encourages *effective and efficient* participation. (Pub. Util. Code, § 1801.3, subd. (b); See also *Opinion Revising the Intervenor Compensation Program* [D.98-04-059], *supra*, 1998 Cal. PUC LEXIS 429, at p. \*115.) The harm and/or prejudice that arise from an exceedingly tardy filing affect the ratepayers who are responsible for paying the intervenor compensation. It is hardly efficient when ratepayers are not noticed of the intervenor's participation from the outset, since notice allows the Commission to control the proceeding in a manner that effectively and efficiently manages costs of intervenor compensation that will later be allocated to the ratepayers. As we have noted: "Participation for its own sake is not what the program is intended to foster. Therefore, as we look at modifying the manner in which we fund participation, we will consider modifications that have appropriate accountability and control mechanisms." (*Opinion Revising the Intervenor Compensation Program* [D.98-04-059], *supra*, 1998 Cal. PUC LEXIS 429, at p. \*115.)

Moreover, LIF's reasons for its late-filing is decidedly inadequate to warrant an exception from the statutory requirement. LIF simply stated "it did not anticipate being an active party at that time." (Notice of Intent to Seek Compensation by Latino Issues Forum, filed December 5, 2005, p. 1.) Nor does LIF indicate in its application for rehearing why it did not submit an NOI when it began to actively participate in the rulemaking in late 2002. Nevertheless, "LIF has been on the service list of this proceeding since its inception and has therefore had ample opportunity to follow its progress. In addition, LIF previously filed three pleadings in this proceeding, one of which was filed on December 23, 2002, almost a year before LIF filed its NOI." (ALJ's Ruling Regarding Notice of Intent to Claim Compensation, filed January 27, 2004, p. 3.) Because LIF does not offer justifiable circumstances or other persuasive reasons for its untimely NOI, there is no justification to grant it a Section 1804(a)(1) exception. In

D.00-03-044, we failed to grant an exemption to a NOI nine months late due to attorney oversight—this case should not be different.<sup>3</sup> (*Opinion Denying Compensation* [D.00-03-044], *supra*, 2000 Cal. PUC LEXIS 168, at p. \*1.)

Based on the discussion above, it is within the Commission’s authority to deny intervenor’s compensation based on an untimely NOI. Therefore, such a determination by the ALJ or the Commission is neither arbitrary nor legally erroneous.

**B. Reasonableness of Creating a Limitation to “New Issues”**

LIF next argues the Commission erred in D.05-07-009, because that decision relied on an arbitrary ruling by ALJ Gottstein which implemented a “new” issue limitation for compensation of future work. LIF contends that there is no basis for such limitation in the letter or intent of the intervention statute. This argument also has no merit.

Legislature contemplated the possibility of new issues emerging after the statutory filing deadline in Section 1804(a)(1): “where new issues emerge subsequent to the time set for filing, the commission may determine an appropriate procedure for accepting new or revised notices of intent.” Pursuant to this statute, a second prehearing conference was scheduled after Assigned Commissioner Kennedy announced her intent to review various policy and program issues in a ruling dated July 3, 2003. LIF was granted permission to file a second NOI in response to the scoping ruling which addressed the new issues that emerged in the second half of the proceeding. ALJ

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<sup>3</sup> LIF notes that Greenaction for Health and Environmental Justice filed also filed a late NOI in this proceeding. However, justifiable circumstances allowed compensation in that case: “Greenaction state[d] it did not become aware of this proceeding until the City of San Francisco's Department of the Environment conducted a community meeting on proposed energy savings programs in the second quarter of 2003. Because the Commission wishe[d] to encourage participation by representatives of diverse communities of interest and considering the ongoing and evolving nature of this proceeding, Greenaction [was] permitted to file its NOI late. In addition, it [was] reasonable to assume that Greenaction and its constituents may not have known about the proceeding until recently. For all of the foregoing reasons, the Commission accept[ed] Greenaction's NOI late for filing.” (ALJ’s Ruling Regarding Notices Of Intent To Claim Compensation, filed October 9, 2003, p. 2.) Unlike Greenaction, LIF was aware of this rulemaking since it was noticed of the OIR in August 2001.

Gottstein's February 18, 2004 ruling on LIF's eligibility limited LIF's contribution to the following new issues: (1) energy efficiency incentives, (2) utility-specific energy savings goals, and (3) revising and updating avoided costs. (ALJ's Ruling Regarding Notice of Intent to Claim Compensation, filed February 18, 2004, p. 4.)

LIF appears to characterize this second half of the proceeding as an opportunity to "cure" its first untimely NOI with a revised NOI, so that it may be compensated for its contribution to *all* issues in the second phase. LIF therefore argues that ALJ Gottstein's ruling to limit LIF to "new" issues is arbitrary, and selectively ignores ALJ Malcolm's earlier ruling which prohibited LIF from seeking intervenor compensation on issues addressed in the first half. It also ignores that many of the issues identified in the February 6, 2004 scoping ruling memo were already addressed in the first prehearing conference.<sup>4</sup> Specifically,

[t]he issue of program evaluation, measurement and verification (EM&V) was identified in the July 3, 2003 Assigned Commissioner's ruling as a topic for this proceeding, both in the context of assessing progress towards meeting program goals to reduce energy consumption and 'if the Commission decides to award incentives for superior performance in meeting or exceeding energy efficiency goals.' That ruling also identified within the scope of this proceeding the issues of long-term program administration, energy savings goals for California, the selection of energy efficiency programs for 2004-2005, the development of criteria and policy rules for 2004-2005 program selection and related issues. As a foundation for addressing these issues, the Assigned Commissioner outlined a set of workshops on 'customer needs,' 'collaboration and partnership among program implementers,' and other topics prior to January 23, 2004 prehearing conference. Per the January 2004 Ruling, LIF is not eligible for compensation for work on these issues.

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<sup>4</sup> See Assigned Commissioner's Ruling Establishing Schedule for High Priority Issues During 2004, and Notice of Workshop on Administrative Structure, filed February 4, 2004, p. 1.

(ALJ's Ruling Regarding Notice of Intent to Claim Compensation, dated February 18, 2004, pp. 3-4.) Simply because a second prehearing conference had occurred, does not allow LIF a second bite of the apple—again, it would be contrary to the legislative intent to encourage the effective and efficient participation of all groups that have a stake in the public utility regulation process. (Pub. Util. Code, § 1801.3, subd. (b).) It is a substantial and likely risk that LIF may duplicate its participation from the first half of the proceeding in the next. Thus, not all issues addressed in the February 6, 2004 scoping memo are available for LIF to claim compensation. Even though LIF claims it did not duplicate its efforts in the second half, it is unfair to ratepayers to compensate LIF for its inefficient behavior by working on specific issues LIF was already placed on notice for which it could not receive compensation.

Given our previous decisions on late-filed NOIs, and the requirements of Section 1804(a)(1), we would be acting inconsistent with the statute if it did not limit LIF's ability to claim compensation to those new issues presented in the second half of the proceeding, absent justifiable circumstances warranting an exception. Thus, no legal error has occurred.

### **C. LIF's Substantial Contribution in the Second Phase**

LIF alleges the Commission acted arbitrarily and capriciously because the decision did not recognize and compensate LIF's substantial contribution to the second half of the proceeding.<sup>5</sup> LIF argues that it seeks compensation only for hours accrued after the second prehearing conference held on January 23, 2004, and for work that only

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<sup>5</sup> "Substantial contribution" means the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. (Pub. Util. Code, §1802, subd. (i).)



addressed issues for which the Commission sought comment in the prehearing conference.<sup>6</sup>

In D.05-07-009, we denied compensation for 97 hours of work related to the Commission decision on administrative structure because it was an issue explicitly excluded as not being a “new” in the ALJ rulings. (*Opinion Denying Intervenor Compensation to Latino Issues Forum for Contributions to Decision 05-01-055* [D.05-07-009] (2005) \_\_\_ Cal.P.U.C.3d \_\_\_, p. 5.) We gave LIF the benefit of the doubt and carefully reviewed LIF’s breakdown of hours by date and activity to determine if any of those hours relate to the issues for which it would be eligible for compensation. (*Id.*) The decision noted:

With a few exceptions, all of the hours listed by LIF relate to work on administrative structure issues. We found only 8 hours that LIF booked to administrative issues that actually relate to other issues in this proceeding, i.e., work on (1) preparing comments on the consumer needs workshop, (2) preparing comments on the draft decision and alternate decision regarding 2003-2004 program funding, and (3) reviewing the order denying rehearing of that decision (D.03-12-060). However, these few hours are also related to issues that were scoped and noticed prior to the January 23 PHC—and are thereby similarly excluded from LIF’s eligibility for compensation in this proceeding.

(D.05-07-009, p. 6.) LIF disagrees with our assessment that it only addressed administrative structure issues that were already addressed the first half, but does not expound on how LIF’s involvement actually related to the new issues which emerged in the second half, e.g., energy efficiency incentives, utility-specific energy savings goals, and revising and updating avoided costs.

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<sup>6</sup> In its request for intervenor compensation, LIF waives compensation for work completed prior to January 23, 2004. (Request for Intervenor Compensation For Substantial Contribution to D.05-01-055, filed March 4, 2005, p. 4.)

We conclude that we acted reasonably in rejecting LIF's claims that its contributions have been in fact substantial.<sup>7</sup> LIF's work in the second half of the proceeding, mainly, if not all, relates to long-term program administration and customer needs, issues specifically proscribed in the first half of the proceeding. LIF did not identify in its rehearing application or request for intervenor compensation how its contribution related to energy efficiency incentives, utility-specific energy savings goals, or revising and updating avoided costs. Therefore, based on these facts, LIF failed to demonstrate it made a substantial contribution related to these new issues during the second half of the proceeding.

### **III. CONCLUSION**

Based on the above discussions, good cause has not been demonstrated for the granting of LIF's application for rehearing. According, rehearing of D.05-07-009 is denied.

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<sup>7</sup> LIF's request for intervenor compensation alleges it substantially contributed in the following: (1) The Commission adopted the NRDC/LIF Coalition's "Reaching New Heights" proposal, (2) LIF emphasized the need to target outreach to hard-to-reach communities so that energy efficiency is available to all, (3) LIF emphasized the need for long-range, sustained and effective program cycles without wasteful ramp-up times, (4) LIF provided real world examples of the pitfalls of third party administration programs, (5) LIF urged the Commission to reject the proposal that competitive bidding always brought about the most efficient results, and highlighted the problem of cream skimming, (6) LIF urged a robust reporting and auditing program to ensure program accountability, and (7) LIF urged advisory group oversight of energy efficiency administration and close coordination of energy efficient administration with low-income programs and other related programs. (Request for Intervenor Compensation For Substantial Contribution to D.05-01-055 by Latino Issues Forum, pp. 4-8.)

**THEREFORE, IT IS ORDERED** that:

1. Latino Issues Forum's Application for Rehearing of D.05-07-009 is denied.

This order is effective today.

Dated October 27, 2005, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
DIAN M. GRUENEICH  
JOHN A. BOHN  
Commissioners